BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TERESA B. GALVAN	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 225,554; 227,838;
	)	& 233,171
HEARTHSTONE RETIREMENT COMMUNITY	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY STATE	)	
OF PENNSYLVANIA and SENTRY	)	
INSURANCE COMPANY	)	
Insurance Carriers	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Claimant appealed the November 20, 2000 Award entered by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on May 2, 2001.

APPEARANCES

Mark W. Works of Topeka, Kansas, appeared for claimant. Matthew S. Crowley of Topeka, Kansas, appeared for respondent and its insurance carrier Insurance Company State of Pennsylvania (State). Kurt W. Ratzlaff of Wichita, Kansas, appeared for respondent and its insurance carrier Sentry Insurance Company (Sentry).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant initiated three claims before the Division of Workers Compensation. The first claim, Docket No. 225,554, alleges a date of accident of "on or about 1-18-94 to present date 7-31-97."[1] In that claim, claimant alleged that she had injured her neck, back and legs from lifting patients, making beds and performing home health care activities. The commencement date of this alleged series of accidents was later amended to January 1, 1994.

In the second claim, Docket No. 227,838, claimant alleged that she had injured her neck, back and legs on or about July 7, 1997, lifting patients, making beds, and performing home health care activities.[2]

In the third claim, Docket No. 233,171, claimant alleged that she injured her back, arm, and knee on or about April 4, 1998, lifting a patient from the floor.[3]

The three claims were consolidated for trial and award. In the November 20, 2000 Award, Judge Benedict found that claimant sustained accidental injuries on January 18, 1994; in June 1996; on July 7, 1997; and on April 4, 1998. But the Judge specifically determined that claimant did not sustain a series of repetitive mini-traumas.

In Docket No. 225,554, the Judge found that claimant had failed to provide respondent with timely written claim for the accidents that occurred on January 18, 1994, and in June 1996. The Judge also determined that claimant had failed to file a timely application for hearing for the January 1994 accident. Accordingly, the Judge denied claimant's request for benefits in that claim.

In Docket No. 227,838, the Judge determined that claimant sustained a work-related accident on July 7, 1997. But the Judge denied claimant's request for permanent partial disability benefits, concluding that claimant failed to prove the amount of functional impairment that was caused by the accident. The Judge, however, did award claimant unauthorized medical benefits up to the $500 statutory maximum.

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[1] Application for Hearing filed with the Division of Workers Compensation on August 5, 1997.

[2] Application for Hearing filed with the Division of Workers Compensation on October 10, 1997.

[3] Application for Hearing filed with the Division of Workers Compensation on April 13, 1998.

Finally, in Docket No. 233,171, the Judge determined that claimant sustained a work-related accident on April 4, 1998. But, again, the Judge denied claimant's request for permanent partial disability benefits, finding that claimant did not sustain any permanent injury or permanent functional impairment from that accident. Therefore, the Judge limited claimant's award to unauthorized medical benefits up to the $500 statutory maximum.

Claimant contends the Judge erred. Claimant argues there is uncontradicted evidence to support her claims for benefits. Accordingly, in her brief to the Board claimant requests the Board to award her authorized, unauthorized and future medical benefits, along with a 100 percent work disability (a disability greater than the functional impairment rating).[4]

Conversely, respondent and State (which is involved in Docket No. 225,554 only) argue the Award should be affirmed as claimant failed to serve upon respondent a timely written claim for compensation as required by K.S.A. 44-520a. They further argue that claimant failed to timely file an application for hearing as required by K.S.A. 44-534(b).

Similarly, respondent and Sentry (which is involved in both Docket Nos. 227,838 and 233,171) argue in their brief to the Board that any award of permanent partial general disability compensation against them should be limited to the additional eight percent functional impairment that claimant's medical expert, Dr. P. Brent Koprivica, attributed to claimant's work activities after the doctor examined claimant in November 1997 until she retired on approximately April 20, 1998. They argue that claimant is not entitled to receive an award for work disability as all of claimant's restrictions were attributable to her January 1994 accident and, in addition, claimant voluntarily left respondent's employment despite respondent's alleged willingness to accommodate her medical restrictions.

In their briefs to the Board, the parties have presented the following issues to the Board:

Docket No. 225,554 (alleged series from January 1, 1994, through July 31, 1997)

1. Did claimant sustain a series of micro-trauma injuries from the work that she was performing for respondent between January 1, 1994, and July 31, 1997?

2. If not, what is the date (or what are the dates) of accident for this claim?

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[4] Claimant does not specify under which docket number the 100 percent work disability should be awarded. Nonetheless, claimant does request an award for $500 in unauthorized medical benefits for each of the three claims.

3. Did claimant serve the respondent with a timely written claim for compensation?

4. Did claimant timely file an application for hearing?

5. What is claimant's average weekly wage?

6. What is the nature and extent of injury and disability?

7. Should any award be reduced for preexisting functional impairment?

Docket No. 227,838 (alleged incident on or about July 7, 1997)

8. What is the nature and extent of injury and disability?

9. Should any award be reduced for preexisting functional impairment?

Docket No. 233,171 (alleged incident on or about April 4, 1998)

10. What is claimant's average weekly wage?

11. What is the nature and extent of injury and disability?

12. Should any award be reduced for preexisting functional impairment?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes:

1. In December 1990, claimant began working for respondent, which is a retirement home. At her June 1998 discovery deposition, claimant testified that she worked for respondent as a certified medication aide. But at the May 2000 regular hearing, claimant testified that she also worked for respondent as a certified nurse's aide. In any event, claimant's job duties included helping the retirement home residents with baths, combing their hair, doing laundry, changing beds and distributing medications. Also, when wheelchair-bound residents lived in the retirement home, claimant's duties included pushing them to and from the dining room for breakfast and lunch.

2. In approximately February 1992 (a date which is not included in any of the alleged dates of accidents), claimant injured her back repositioning a resident in bed. Although

claimant recovered sufficiently to eventually return to work, from that date forward she experienced chronic low back pain. Claimant reported the injury to respondent.

3. On approximately January 18, 1994, claimant again injured her back at work while pushing residents up to the dining table. At her discovery deposition, claimant described the January 1994 accident as a specific incident. The pain that claimant experienced from the January 1994 incident was in the same part of her low back as the pain from the February 1992 incident. Claimant also reported the accident to respondent and received both authorized medical care and temporary total disability benefits.

4. After the January 1994 incident, claimant received medical treatment from Dr. Deborah Mowery. The doctor obtained an MRI scan that revealed degenerative disk disease at L3-4, L4-5 and L5-S1. According to the history taken by claimant's medical expert, Dr. P. Brent Koprivica, claimant missed approximately three months of work and treated with Dr. Mowery from March 1994 until June 1996, when the doctor released claimant from ongoing care.

5. According to claimant, in June 1996 she again injured her back and reported it to respondent. Claimant can remember this incident as it occurred shortly after her birthday. According to claimant, after this incident she began having pain into her left leg. At the regular hearing, claimant attributed her ongoing complaints to that incident as she feels that before the incident she was physically able to perform all of her job tasks but after the incident she was not. Additionally, claimant feels that her condition has worsened following that injury. On the other hand, claimant failed to tell her medical expert, Dr. Koprivica, at either of their two meetings (in November 1997 and October 1999) about the June 1996 accident. According to Dr. Koprivica, claimant only told him about three work-related accidents, which occurred on February 12, 1992; January 18, 1994; and in February 1998. Claimant's testimony is uncontradicted that she reported the June 1996 injury to respondent and was told to use her private health insurance to obtain medical treatment rather than filing a claim for workers compensation benefits.

6. Claimant also testified that she injured her back at work in July 1997 and in April 1998. In July 1997, claimant again injured her back pushing people's chairs to the dining room table. Finally, in April 1998, claimant injured her back helping a resident who had fallen on the floor. After that incident, claimant retired as she was afraid to continue to work. Claimant's testimony is uncontradicted that she immediately reported both of these incidents to respondent. Claimant worked for respondent until approximately April 20, 1998, and claimant has not worked for any employer since that time.

7. Claimant's attorney hired Dr. Koprivica to evaluate claimant and to testify in these claims. As indicated above, the doctor saw claimant on two occasions. Following the initial

evaluation in November 1997, the doctor determined that claimant sustained a five percent whole body functional impairment from the February 1992 accident and a 10 percent whole body functional impairment from the January 1994 accident. After seeing claimant a second time in October 1999, the doctor determined that claimant had sustained an additional eight percent whole body functional impairment from the cumulative injuries that claimant sustained through her last day of work coupled with a specific injury that she sustained in February 1998, which the doctor believed occurred while helping lift a resident who had fallen. According to the doctor, claimant's medical restrictions are attributable to the January 1994 accident and resulting injury. No other medical expert testified to contradict Dr. Koprivica's opinions.

8. Based upon Dr. Koprivica's uncontradicted testimony, the Board finds that claimant sustained a five percent whole body functional impairment from the February 12, 1992 accident, an additional 10 percent whole body functional impairment from the January 18, 1994 accident, and an additional eight percent whole body functional impairment from the April 1998 accident. The Board finds that the incident that Dr. Koprivica believed occurred in February 1998 was the April 1998 incident in which claimant injured her back lifting a resident who had fallen to the floor.

9. The Application for Hearing that initiated Docket No. 225,554 was filed on August 5, 1997.

10. The Award entered in Docket No. 225,554 should be modified to award claimant the authorized medical benefits and the temporary total disability benefits that were voluntarily paid to claimant while she recovered from her January 18, 1994 work-related injury. The Board finds that claimant failed to prove that she sustained a series of repetitive micro-traumas, which would otherwise extend the time for providing notice, providing written claim and filing an application for hearing. Instead, the claimant has proven through the testimony of her expert medical witness that she sustained three separate, distinct accidents on February 12, 1992; January 18, 1994; and in April 1998, which have resulted in permanent injury and permanent functional impairment. Nevertheless, the request for permanent partial general disability benefits from the January 1994 accident should be denied as claimant failed to timely file an application for hearing. The record indicates the last date that respondent and State paid medical expense on that injury was July 1, 1994. Accordingly, the Application for Hearing that includes the January 1994 date of accident, which was filed on August 5, 1997, was filed beyond the allotted three years from the date of accident and beyond the allotted two years from the last date of payment of compensation. K.S.A. 44-534 (Furse 1993) provides:

> (b) No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the

> director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.

Based upon the conclusion that claimant has failed to file a timely application for hearing, the remaining issues listed above under Docket No. 225,554 are rendered moot.

11. In Docket No. 227,838, the Award should be modified to award claimant as authorized medical benefits the reasonable and necessary medical expense that claimant incurred for treating the July 1997 injury. The Board affirms the denial of permanent partial general disability benefits as the record fails to prove that it is more probably true than not that claimant sustained permanent injury or permanent functional impairment from that incident. The Board affirms the award of unauthorized medical benefits up to the $500 statutory maximum.

12. In Docket No. 233,171, the Award should also be modified to award claimant as authorized medical benefits the reasonable and necessary medical expense that claimant incurred for treating the April 1998 injury. Moreover, claimant should be awarded an eight percent permanent partial general disability. The request for a work disability is denied as the evidence fails to prove that claimant lost the ability to perform any work tasks as a result of that accident. Instead, the Board is persuaded by Dr. Koprivica's testimony that all of her medical restrictions and limitations are attributable to the January 1994 accident. Accordingly, claimant's ability to work or ability to perform work tasks is causally related to the January 1994 accident rather than this later incident.[5] Further, the Board also finds that the April 1998 accident did not cause any of claimant's wage loss. Rather, claimant voluntarily terminated her employment. The Board finds that claimant has not put forth a good faith effort to continue to work following the April 1998 accident and, therefore, the Board should impute the wages that she was earning while working for respondent as her post-injury wage. Accordingly, the claimant has sustained neither task loss nor wage loss as a result of the April 1998 accident.

Permanent partial general disability is determined under K.S.A. 1997 Supp. 44-510e, as follows:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning

[5] See *Surls v. Saginaw Quarries, Inc.*, 27 Kan. App. 2d 90, 998 P.2d 514 (2000).

> after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[6] and *Copeland*.[7] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[8]

The Court of Appeals in *Watson*[9] recently reaffirmed the rule that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker fails to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based on all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder [sic] must

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[6] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[7] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[8] *Copeland*, at 320.

[9] *Watson v. Johnson Controls, Inc.*, ___ Kan. App. 2d ___, 36 P.3d 323 (2001).

> determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[10]

As indicated above, the Board concludes claimant's ability to work for respondent as a certified medication aide has not been impaired by reason of the April 1998 accident and, therefore, claimant retains the ability to earn the same wages that she was earning before she decided to retire. Accordingly, claimant has no task loss and no wage loss attributable to the April 1998 accident. Therefore, claimant is entitled to receive permanent partial general disability benefits based upon her eight percent whole body functional impairment rating. Additionally, the Board affirms the award of unauthorized medical benefits up to the $500 statutory maximum.

13. The award for an eight percent permanent partial general disability should not be reduced by an amount for preexisting functional impairment as the eight percent is over and above the functional impairment that claimant had before the accident.

14. The Board finds claimant's average weekly wage was $291.67 for the April 1998 accident. Based upon claimant's testimony at her discovery deposition, the Board finds that at the time of the accident claimant was earning $6.59 per hour straight time (or $263.60 per week). From claimant's testimony at the regular hearing, the Board finds claimant earned an average bonus of $9.62 per week and an average of $18.45 per week that respondent paid into claimant's retirement plan.

AWARD

WHEREFORE, the Board modifies the November 20, 2000 Award, as follows:

In Docket No. 225,554, the Board awards claimant the authorized medical benefits and the temporary total disability benefits that respondent and State provided claimant following the January 1994 accident. The Board affirms the denial of permanent partial general disability benefits and other benefits.

In Docket No. 227,838, the Board awards claimant as authorized medical benefits the reasonable and necessary medical expense that claimant incurred following the July 1997 accident. The Board affirms the award of unauthorized medical benefits up to the $500 statutory maximum, and the Board affirms the denial of permanent partial general disability benefits. Claimant may seek additional medical benefits upon proper application to the Director.

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[10] *Watson*, syl. 4.

In Docket No. 233,171, the Board awards claimant as authorized medical benefits the reasonable and necessary medical expense that claimant incurred following the April 1998 accident and awards claimant an eight percent permanent partial general disability. The Board affirms the award of unauthorized medical benefits up to the $500 statutory maximum. Claimant may seek additional medical benefits upon proper application to the Director.

Teresa B. Galvan is granted compensation from Hearthstone Retirement Community and Sentry Insurance Company for an April 4, 1998 accident and resulting disability. Based upon an average weekly wage of $291.67, Ms. Galvan is entitled to receive 33.20 weeks of permanent partial disability benefits at $194.46 per week, or $6,456.07, for an eight percent permanent partial general disability, making a total award of $6,456.07, which is all due and owing less any amounts previously paid in this claim.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of April 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mark W. Works, Attorney for Claimant
Matthew S. Crowley, Attorney for Respondent and State
Kurt W. Ratzlaff, Attorney for Respondent and Sentry
Jerry R. Shelor, Attorney for Fund
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Workers Compensation Director